No. 5921

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

KAICHIRO SUGIMOTO,
Appellant,

vs.

JOHN D. NAGLE, as Commisisoner of Immigration for the Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE

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STATEMENT OF FACTS

This is an appeal from a judgment of the District Court for the Southern Division of the Northern District of California, denying a petition for writ of habeas corpus filed on behalf of appellant, who stands excluded from the United States by the decision of a Board of Special Inquiry at San Francisco, affirmed on appeal by the Secretary of Labor.

The petition and amended petition set up the findings of the Board of Special Inquiry at the Port and the findings of the Board of Review at Washington on appeal (Tr. 4, 5 and 13-17 inclusive). The facts found by

the executive board are not disputed. Appellant was admitted into Hawaii on July 29, 1907. During August, 1907, he came to San Francisco, paying $60 to be smuggled in aboard a freighter. At that time he was a laborer and did not have a passport entitling him to come to the continental United States. He remained here until July 18, 1928, when he departed for Japan (Tr. 4 and 5).

Appellant seeks admission under § 4-B of the Immigration Act of 1924 (8 USCA § 204) as:

> "An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad."

The Department has ruled that detained may reenter Hawaii if he so desires, as he was previously admitted to that territory, but that since his previous admission was a limited one, merely for residence in Hawaii and since such previous residence as he has had in the continental United States was unlawful, he has no right of entry to the continental United States (Tr. 13 to 17 incl.).

ISSUE OF THE CASE

The issue before this Court is whether, upon the facts found by the executive, appellant is embraced within § 4-B of the Immigration Act of 1924, quoted above; more narrowly: Is appellant one "previously lawfully admitted to the United States" for the purposes of that section?

Appellant's argument has three phases:

(a) That having been admitted to Hawaii in 1907 he

is now an immigrant previously lawfully admitted to the United States who is returning from a temporary visit abroad within the meaning of § 4-B of the Immigration Act of 1924, supra, the term "United States" being defined in § 28 of the same Act (8 USCA § 224) as meaning "the states, the territories of Alaska and Hawaii, the District of Columbia, Porto Rico, and the Virgin Islands."

(b) That if appellant avails himself of the privilege extended to him by the Secretary of Labor of proceeding to and entering Hawaii, he can immediately return to and enter the mainland since he is not now a laborer;

(c) That the entry of appellant from Hawaii to the mainland in 1907 was not unlawful because there is no legal authority for the President's proclamation promulgated on March 14, 1907, which prohibits the coming from Hawaii to the continental United States of Japanese laborers.

ARGUMENT

A. APPELLANT IS NOT ONE "PREVIOUSLY LAWFULLY ADMITTED TO THE UNITED STATES" WITHIN THE MEANING OF § 4-B OF THE IMMIGRATION ACT OF 1924.

To determine whether appellant is an immigrant previously lawfully admitted to the United States who is returning from a temporary visit abroad, it is necessary to look to the circumstances of his original entry and to the laws applicable thereto.

When detained originally entered the continental United States from Hawaii, the Immigration Act of February 20, 1907, (34 Stats. 898, C. 1134) was in force.

Section 1 of that Act contained the following provision:

> "Provided further, that whenever the President shall be satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the Canal Zone are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, the President may refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such other country or from such insular possessions or from the Canal Zone."

This provision is similar to that now contained in § 3 of the Immigration Act of February 5, 1917, (8 USCA § 136).

In pursuance of the Immigration Act of 1907, the President on March 14, 1907, issued the following proclamation:

> "Whereas, by the act entitled 'An Act to regulate the immigration of aliens into the United States,' approved February 20, 1907, whenever the President is satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the Canal Zone, are being used for the purpose of enabling the holders to come to the Continental territory of the United States to the detriment of labor conditions therein, it is made the duty of the President to refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such country or such insular possession or from the Canal Zone;
>
> "And whereas, upon sufficient evidence produced before me by the Department of Commerce and Labor, *I am satisfied that passports issued by*

> *the government of Japan to citizens of that country* or Korea and who are laborers, skilled or unskilled, to go to Mexico, to Canada, *and to Hawaii,* are being used for the purpose of enabling the holders thereof to come to the continental territory of the United States to the detriment of labor conditions therein;
>
> "*I hereby order that such citizens of Japan or Korea,* to-wit, Japanese or Korean laborers, skilled and unskilled, who have received passports to go to Mexico, Canada, *or Hawaii, and come therefrom, be refused permission to enter the continental territory of the United States.*
>
> "It is further ordered that the Secretary of Commerce and Labor be, and he hereby is, directed to take, through the Bureau of Immigration and Naturalization, such measures and to make and enforce such rules and regulations as may be necessary to carry this order into effect."

The history of this legislation is reviewed by this Court in the case of Akira Ono v. United States, 267 Fed. 359. The proclamation above cited continued in effect until February 24, 1913, when President Taft issued a similar proclamation under the so-called "gentlemen's agreement" between the United States and Japan. The provision cited from the Act of February 20, 1907, was re-enacted in §3 of the Act of February 5, 1917 (8 USCA § 136), now in force.

It is clear from the foregoing that appellant's admission into Hawaii in 1907 was a restricted admission and carried simply the privilege to reside in that territory. It is equally clear that when he thereafter smuggled himself into the continental United States, being then a laborer, his entry into the continental United States and subsequent residence therein was in violation of law.

Appellant contends, however, that under § 28 of the Immigration Act of 1924 (8 USCA §224) the territory of Hawaii is embraced within the meaning of the term "United States" and that having been admitted into Hawaii appellant is now entitled to enter any portion of the United States by virtue of such admission.

It does not seem to be seriously contended by appellant that he has derived any rights from the fact that he has resided in the continental United States for a number of years, his sole claim resting upon his admission to Hawaii in 1907. The authorities are unanimous that an alien can gain no rights by a residence in the United States which has been unlawfully acquired.

> *Hurst v. Nagle* (C. C. A.-9), 30 F. (2d) 346;
> *U. S. ex rel Fanutti v. Flynn,* 17 F. (2d) 432;
> *Ex parte Chun Wing,* 18 Fed. (2d) 119;
> *Ex parte Mac Fook,* 207 Fed. 696;
> *Ex parte Di Stephano,* 25 F. (2d) 902;
> *Dominici v. Johnson,* 10 F. (2d) 433.

In Hurst v. Nagle, *supra,* this Court said, "No domicile in the United States can be established by an alien whose original entry was unlawful."

In the case of Ex parte Chun Wing, 18 F. (2d) 119, District Judge Neterer said:

> "Residence in the United States fraudulently obtained, creates no right. This court in Ex parte *Mac Fook,* 207 Fed. 696, at page 698 said: 'No lapse of time would ripen such a wrong into a right nor afford a basis upon which to predicate abuse of discretion.' "

And the Court said further:

> "Clearly residence must be legal residence. Fraud vitiates everything."

In U. S. ex rel Fanutti v. Flynn, 17 F. (2d) 432, the Court said:

> "Having resided unlawfully in this country for a period of five years and continuing an alien, his status was not changed. He did not thereby become exempt from the operation of the Immigration Act. His departure and absence subjected him to the Act relating to the exclusion and deportation of aliens *in the same manner as though he had no previous domicile in this country.*"

The Court further said:

> "It makes no difference that he could have remained here, assuming such to be the fact, had he not departed and sought to return."

Appellant contends that having been admitted to Hawaii he has been lawfully admited to the United States, Hawaii being a part of the United States, and hence that he has a right now to re-enter the continental United States.

The original entry of appellant to the continental United States was clearly unlawful. Under the authorities cited above, he could gain no rights by his surreptitious entry to the mainland greater than were impiled in his admission to Hawaii. The right given him by his admission to Hawaii was the right to reside in that territory and the law specifically prohibited his coming to the mainland. His surreptitious entry to and subsequent residence in the continental United States was therefore unlawful and a fraud upon the government, and hence, under the authorities, left him in the same position as if he had never come to the mainland.

The various immigration acts are in *pari materia* and must be read together as one act.

> *Commisisoner of Immigration v. Gottlieb,* 265 U. S. 310;
> *Hurst v. Nagle* (C. C. A-9), supra, 30 F. (2d) 346;
> *U. S. ex rel Barone v. Curran,* 7 F. (2d) 302;
> *U. S. v. Tod,* 297 Fed. 214.

Section 25 of the Immigration Act of 1924 (8 USCA § 223) provides:

> "The provisions of this act are in addition to and not in substitution for the provisions of the immigration laws, *and shall be enforced as a part of such laws,* and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this act."

The facts show that appellant has not been previously lawfully admitted to the "United States." He has been previously granted an admission specifically restricted to a part of such United States, his migration to other territories embraced within the United States having been expressly prohibited by law.

Petitioner is attempting to isolate certain portions of the Act of 1924 and argue therefrom that there is a *casus omissus* in that statute. But § 25 of that Act (8 USCA § 223) expressly provides that said Act shall be enforced as a part of the immigration laws, and § 28 of the same Act (8 USCA § 224) defines the term "immiragtion laws" as including all laws, conventions and treaties of the United States relating to the immigration, exclusion or expulsion of aliens. The language of

the Act clearly shows that the suggested loophole by which an alien might gain a preferred status by his earlier evasion of the immigration statutes is in fact non-existent.

As to the history and purpose of the restrictions upon Japanese domiciled in the Territory of Hawaii, we quote briefly from a pamphlet issued by the Department of Labor in January, 1929, entitled "Problems of the Immigration Service:"

> "The estimated population of Hawaii on June 30, 1928, was 348,767, exclusive of the military and naval establishments. Of this population, in round numbers, 37,000 are American, English, German or Russian in race; *135,000 Japanese, 6,000 Koreans;* 60,000 Filipinos; 25,000 Chinese; 21,000 Hawaiians; 29,000 Portuguese; 2,000 Spaniards; 7,000 Porto Ricans; 10,000 mixed Hawaiian-Oriental; 16,000 mixed Hawaiian-white."
>
> "Congress in enacting immigration and naturalization legislation has differentiated between persons of the white and of brown and yellow races. In naturalization matters this has been true for over a hundred years; in immigration matters since 1882, so far as Chinese are concerned, and since 1907 so far as Japanese and Koreans are concerned, and most emphatically to the same effect is section 13 of the immigration act of 1924."
>
> "The restrictions upon Chinese aliens domiciled in Hawaii are a part of the contract under which Hawaii was annexed to the United States some 30 years ago. The restrictions as to alien Japanese and Korean laborers domiciled in Hawaii is the natural and reasonable outgrowth of certain exceptional concessions made by the Federal Government to the Territory of Hawaii in the importation of contract laborers, * * * "

The position contended for by appellant would involve a holding that the largest racial group in the Territory of Hawaii, which racial group Congress has seen fit to prohibit from coming to the continental United States for the reasons set forth above, might all evade this prohibition by going abroad and coming thence to the continental United States and demanding admission thereto on the ground that they had been previously admitted to Hawaii and hence that they were aliens "previously lawfully admitted to the United States" and "returning from a temporary visit abroad." To state the proposition is to show its absurdity.

To attribute such an intention to Congress in enacting § 4(b) of the Immigration Act of 1924, would be preposterous. It is true that Congress in that Act uses the expression "continental United States," and uses it solely in regard to the national origins plan of computing annual quotas on the basis of the number of inhabitants of each nationality who were domiciled in the "continental United States" in 1920 (8 USCA § 212). But nowhere in the Act does there appear any intention to enlarge the privileges of aliens who at the time of its enactment had only a restricted right of residence in the country. As appellant states, for the first time in history Congress by the Act of 1924, created for immigration purposes a class designated as "aliens ineligible to citizenship," and provided for their absolute exclusion with certain narrow exceptions. In view of this fact and the explicit language of § 25 of the Act, *supra,* it is obvious that the Act does

not contemplate a removal of the bars upon Japanese and Chinese immigration from Hawaii to the continental United States.

Appellant's argument amounts to this: That if an alien has been admitted to the United States under any circumstances, conditions or restrictions whatsoever, he would be entitled to re-enter the United States without restriction by reason of the fact that immigrants previously lawfully admitted to the United States and returning after a temporary visit abroad are made non-quota immigrants by § 4-B of the Immigration Act of 1924. It would hardly be contended, for instance, that an alien who had been previously admitted for a period of 60 days as a seaman or for a temporary period as a visitor could leave the United states temporarily and on the basis of his previous conditional admission demand an unconditional admission on his return. Yet the previous admission of appellant to Hawaii is just as much a restricted and conditional admission as would be a previous admission as a temporary visitor or as a seaman in pursuit of his calling as such.

The applicable principle of law in this case is very clear from this Court's recent decision in the case of Hurst v. Nagle, 30 F. (2d) 346, *supra*. There the appellant had originally entered the United States unlawfully. After residing here for some time he crossed the border to Mexico and re-entered the United States the same day. He was ordered deported on the ground that his entry from Mexico was in violation of the first Quota Act of May 19, 1921, as amended (which act has now been superseded by the Act of 1924, involved

here). Appellant made the same contention as is raised by petitioner here. He contended that since the Act of 1921, exempted "aliens returning from a temporary visit abroad," he was not within the excluded class at the time of his re-entry as that Act did not require him to show a prior lawful admission in order to bring himself within that exemption, and that the Department was attempting to read into the statute language not contained therein. In affirming the judgment of the District Court denying the writ, this Court said:

> "We think the returning aliens there referred to are aliens who had been lawfully domiciled in the United States. Such is the construction placed upon the act by the Secretary of Labor, in providing by rule 2a that temporary absence shall be construed to mean 'an absence in any foreign country without relinquishment of domicile,' thus clearly importing that the domicile in the United States must have been lawful. No domicile in the United States can be established by an alien whose original entry was unlawful. U. S. v. Flynn (D. C.) 17 F. (2d) 432; Domenici v. Johnson (C. C. A.) 10 F. (2d) 433; Ex parte Di Stephano (D. C.) 25 F. (2d) 902."

The Court went on to refer to the well-settled rule that the immigration statutes are in *pari materia.*

The petition of Hurst to the United States Supreme Court for *certiorari* was denied. (279 U. S. 861).

The doctrine in that case is plainly applicable to the situation here and is ample authority for the proposition than an alien having been granted the privilege of residence in a certain portion of the United States can not by evading a statute prohibiting his entry to

other portions thereof, acquire any right based upon his evasion.

Appellant's argument as to the principles of statutory construction loses its force when applied to the circumstances of this case and of the case of Hurst v. Nagle, *supra,* the decision in which clearly shows that an alien's right of re-entry as a returning resident can only grow out of previous lawful domicile.

As to the case of U. S. *ex rel* Pantoja, 29 F.(2d) 586, cited and discussed in petitioner's points and authorities, which case was decided on the theory that an alien making a round trip foreign from the United States on an American vessel was not out of the United States on the voyage, it is sufficient to invite attention to the fact that this doctrine was overruled by the Supreme Court in an opinion rendered on May 13, 1929, in the case of U. S. *ex rel* Claussen v. Day, 279 U. S. 399, wherein the Supreme Court held that such an alien was "coming from a foreign port or place."

B. APPELLANT COULD NOT IMMEDIATELY ENTER THE CONTINENTAL UNITED STATES FROM HAWAII AT THIS TIME.

The second contention of appellant is: That if he should avail himself of the privilege extended by the Secretary of Labor of proceeding to and entering the territory of Hawaii at this time, he could immediately return to and enter the continental United States because he is not now a laborer.

Appellant's contention in this regard meets with the same difficulty as his first contention. His claim here is based upon the fact that after smuggling into the con-

tinental United States he engaged in the occupation of restaurant keeper and hence acquired a status which removes him from the class of laborers.

It is settled that under the immigration laws the exempt status or occupation is a status existing at the time of application for entry and not a status to be thereafter acquired.

> *Tulsidas v. Insular Collector of Customs,* 262 U. S. 258.

In Wong Fat Shun v. Nagle, 7 F.(2d) 611, this Court said:

> "And the entry having been unlawful, he could not thereafter acquire an exempt status by engaging in the business of a merchant in San Francisco. (Citing U. S. v. Chu Chee, 93 Fed. 797, 35 C. C. A. 613; Ex parte Wu Kao (D. C.), 270 Fed. 351."

Accord:

> *In re Low Yin,* 13 F. (2d) 265;
> *Ewing Yuen v. Johnson,* 299 Fed. 604.

In the case of Tulsidas v. Insular Collector of Customs, *supra,* the applicants involved were of that racial group of Asiatics who are, with certain exceptions, excluded from the United States by § 3 of the Immigration Act of February 5, 1917 (8 USCA § 136). The claim advanced was that the applicants were merchants by reason of the fact that they had entered into a partnership agreement to conduct a business at Manila after entry. It was held that such a situation was insufficient to exempt the applicants from the classification of "laborer" as used in the Immigration Act, and that an alien must show that he possessed a mercantile status in the country from which he came

and not merely a status to come, or a status to be established in the United States.

Similarly the other authorities cited above establish the settled proposition that no rights can flow from a residence in the United States which was unlawful in its inception and that no exempt status follows from a mercantile occupation followed in the United States after an unlawful entry. Appellant's second contention is directly opposed to these settled principles inasmuch as his claim to be of an exempt status rests upon the fact of the occupation which he pursued in the continental United States after his surreptitious and unlawful entry thereto.

C. THERE WAS LEGAL AUTHORITY FOR THE PRESIDENT'S PROCLAMATION OF MARCH 14, 1907.

Appellant's third contention merits but passing mention. He suggests a doubt that Congress could constitutionally have imposed restrictions upon alien travel from Hawaii to the continental United States.

Nothing is better settled than that the power of Congress over the entire subject of immigration is plenary, and that Congress may constitutionally regulate the admission of aliens to and the residence of aliens in the United States, and may prescribe terms and conditions upon which they may enter, reside in, or pass through the United States.

Yamataya v. Fisher (the Japanese immigrant case), 189 U. S. 86;
Chuoco Tiaco v. Forbes, 228 U. S. 549;
Lapina v. Williams, 232 U. S. 78;
Wong Wing v. U. S., 163 U. S. 228;
Keller v. U. S., 213 U. S. 138;
Lem Moon Sing v. U. S., 158 U. S. 538.

Over no conceivable subject is the power of Congress more complete.

Oceanic Steamship Nav. Co. v. Stranahan, 214 U. S. 320.

Appellant further suggests that under the Immigration Act of February 20, 1907 (34 Stats. 898, c. 1134), the territory of Hawaii is not included within the meaning of the language "any insular possession of the United States."

Since the power conferred by that act is to refuse to permit certain aliens to enter the *"continental territory of the United States,"* it would seem to be clear that the language "any insular possession of the United States" would necessarily include Hawaii and hence, that the President's proclamation of March 14, 1907, specifically mentioning Hawaii, was promulgated under definite authority of Congress. It is significant that in the prohibition contained in the President's proclamation, Hawaii is the only insular territory of the United States which is mentioned, and taken in connection with the history of the legislation, judicial notice of which was taken by this Court in the case of Akira Ono v. U. S., *supra,* it is difficult to say that Congress did not have the territory of Hawaii *particularly* in mind in enacting the legislation referred to.

D. APPELLANT IS ALSO PROHIBITED FROM ENTERING THE CONTINENTAL UNITED STATES UNDER THE PRESIDENT'S PROCLAMATION OF FEBRARY 24, 1913, WHICH IS NOW IN FORCE (8 USCA § 136; RULE 7 IMMIGRATION RULES OF MARCH 1, 1927).

At the time appellant left Japan and at the time he clandestinely entered the continental United States, he

was a laborer. His only claim to be other than a laborer rests upon pursuits which he followed here after his unlawful entry from Hawaii. On the authorities cited above such pursuits avail him nothing to remove him from the classification of laborer under the immigration laws. Hence, by reason of § 3 of the Immigration Act of February 5, 1917 (8 USCA § 136), and the President's proclamation of February 24, 1913, both of which are still in force, appellant is prohibited from entering the continental United States at this time for a reason additional to that heretofore discussed. In Akira Ono v. U. S., *supra,* this Court held that under the act and proclamation just referred to, a Japanese person who is a laborer is prohibited from entering the continental United States even with a passport from his government. In that case this Court said, at page 363:

> "It is obvious, therefore, that even if the appellant had arrived at Galveston with a passport from his government and had sought by reason thereof entry into this country, the immigration officials at Galveston would have, as in duty bound, denied him admission; a fortiori, his surreptitous entry into the United States was clearly unlawful."

It is true that this additional ground for exclusion was not mentioned by the Board of Special Inquiry nor by the Secretary of Labor. However, in Weedin v. Mon Him, 4 F.(2d) 533, this Court said:

> "In disposing of the question of the appellant's right to enter the United States we are not confined to a consideration of the grounds on which he was excluded by the local authorities; we may properly advert to other ground on

which as matter of law that conclusion would follow."

CONCLUSION

Concisely stated, the present case amounts to this: Appellant obtained in 1907 a restricted admission to the territory of Hawaii carrying the privilege of residing within that territory. It is undisputed that he was then a laborer and had no passport entitling him to come to the continental United States. Almost immediately after obtaining his restricted admission he proceeded to enter the continental territory of the United States in a clandestine manner. His entry to the continental United States at that time was clearly prohibited by law. He departed from the United States and now demands re-admission into the continental United States on the basis of his former unlawful and fraudulent residence therein.

All the authorities we have been able to find are uniformly to the effect that no rights whatever flow from such an unlawful entry and residence in the United States, and that the fact that such an alien may have followed an exempt pursuit during the period of his unlawful presence here, avails him nothing toward a right to re-enter or remain.

Appellant can point to no basis for his claim of right to enter at this time except his previous action in evading the laws of the United States. Under the settled principles of law which we have discussed above, appellant is in the same position as though he had never come to the mainland from Hawaii. Hence, his rights of re-entry can be no broader than those implied in his

restricted admission to that territory, which restricted admission is the limit of the only privilege which the United States has ever accorded to him.

Not only is the domicile to which appellant claims to be returning legally non-existent, but his entry is also prohibited under other portions of the immigration laws. At the time he left Japan he was a laborer. At the time he left Hawaii he was a laborer. And within the scope of the immigration laws he is still a laborer inasmuch as his only claim to be otherwise rests upon an occupation which he pursued during his unlawful residence in the United States. Having legally estabilshed no other status than that of a laborer, he is prohibited from entering at this time by the Persident's proclamation of February 24, 1913, which is still in force (8 USCA § 136; Rule 7, Immigration Rules of March 1, 1927), this wholly apart from the fact that he is also prohibited from entering the United States by the Immigration Act of 1924, since he is not within the exception contained in § 4-B of that Act (8 USCA § 204).

It is submitted that the judgment of the Court below denying the petition for writ was correct and should be affirmed.

Respectfully submitted,

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